To: Chairman Sherwood and Members of the Montana Public Defender Commission

From: Joslyn Hunt, Chief Appellate Defender

Date: December 11, 2009

Subject: Conflict of Interest Issue

At the last commission meeting, I was asked to brief the conflict issue with regard to the appellate office, the regional offices, and the Contracts Manager. The following details the research and analysis on those issues. This brief is a group effort from the appellate attorneys. Through their considerable efforts and discussion, this brief follows.

At the outset, before addressing the specific issues, the Commission should know that the issues presented have no clear-cut answer. Some jurisdictions apply a per se bar. *See Hill v. State*, 566 S.W.2d 127 (Ark. 1978); *McCall v. District Court*, 783 P.2d 1223 (Colo. 1989); *Angarano v. United States*, 329 A.2d 453 (D.C. 1974); *Adams v. State*, 380 So.2d 421 (Fla. 1980); *Ryan v. Thomas*, 409 S.E.2d 507, 509 (Ga. 1991); *State v. Veale*, 919 A.2d 794 (N.H. 2007); *State v. Bell*, 447 A.2d 525 (N.J. 1982); *Commonwealth v. Moore*, 805 A.2d 1212, 1215 (Pa. 2002).

Other jurisdictions look at the issue on a case-by-case basis. *Cannon v. Mullin*, 383, F.3d 1152 (10th Cir. 2004); *People v. Banks*, 520 N.E.2d 617 (Ill.

1987); *Morales v. Bridgforth*, 100 P.3d 668 (N.M. 2004); *State v. Lentz*, 639 N.E.2d 784 (Ohio 1994); *Simpson v. State*, 769 A.2d 1257 (R.I. 2001).

What is clear from the following is that for OPD, as a state-wide agency, the Montana Supreme Court will need to address the issue. It is only when the Court has issued an Opinion that the Commission, OPD, and ADO will truly know the answer.

STATEMENT OF THE ISSUES

1. Given that the Chief Appellate Defender reports to the Chief Public Defender, does a per se conflict of interest exist when the Appellate Defender Office accepts cases from the Regional Public Defender Offices and sometimes raises ineffective assistance of counsel claims against the regional attorneys?

2. Given that all of the Regional Offices are supervised by the Chief Public Defender, does a per se conflict of interest exist between the Regional Offices when cases are transferred between regions?

3. Given that the Contract Manager reports to the Chief Public Defender, does a per se conflict of interest exist when trial and appellate cases are contracted outside of the Office of the State Public Defender?

What the above-stated issues actually boil down to is whether the structure of OPD creates a per se conflict of interest?

The legal profession has "core values" of professional independent judgment; protection of confidential information; and loyalty to the client through the avoidance of conflicts of interest. *See* Op. 000111.

Rule 1.7 (Conflict of Interest) of the Montana Rules of Professional Conduct provide:

> (a) [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation or one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

Comment 4 to Rule 1.7 of the Model Rules (which is the same as the current Rule 1.7) concludes that the "critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses

of action that reasonably should be pursued on behalf of the client." That is, the duty of loyalty remains to the client. And, the duty of loyalty is "perhaps the most basic of counsel's duties." *State v. Jones*, 278 Mont. 121, 125 (1996) (*quoting Strickland v. Washington*, 466 U.S. 668, 692 (1984)).

Rule 1.10 (Imputation of Conflicts of Interest) of the Montana Rules of Professional Conduct provides:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

The imputed disqualification may be waived by a client in the same manner as described in Rule 1.7. *See* Rule 1.10(d).

Rule 1.10(a) applies the duty of loyalty found in Rule 1.7. Consequently, "each lawyer is vicariously bound by the obligation of loyalty owed by all lawyers with whom that lawyer is associated." *In re Marra*, 2004 MT 8, ¶ 8, 319 Mont. 213, 87 P.3d 384. The imputed disqualification rule is absolute. *In re Marra*, ¶ 10. Hence, the first step is to determine whether a particular lawyer, considered alone, would be barred from taking on a case or continuing representation in a case. If the lawyer is barred, the second step automatically extends the bar to the all of the lawyers in that firm. *In re Marra*, ¶ 10. *See also In re Rules of Professional Conduct and Insurer Imposed*, 2000 MT 110, ¶ 51, 299 Mont. 321, 2 P.3d 806 (the

Montana Supreme Court concluded defense counsel who submit to the requirement that an insurer give prior approval of defense expenses "violate their duties under the Rules of Professional Conduct to exercise their independent judgment and to give their undivided loyalty to their clients," the insureds).

A firm is defined as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." Rule 1.0(e). "Lawyers in a firm, or in a close association like a firm, in fact normally function more or less as a single unit. They consult each other, have access to each other's files, overhear conversations with clients, and have a mutual financial interest in their client's cases." *In re Marra*, ¶ 9. But in OPD we have no mutual financial interest; we have interest in each individual client, not money.

The imputed disqualification rule applies the duty of loyalty, which is the conflict of interest rule. A lawyer shall have loyalty to his/her client, and where there is a significant risk that the lawyer's representation of his/her clients is materially limited by the lawyer's responsibilities to a third person--here the Chief Public Defender under the current structure of OPD--the question becomes whether the duty of loyalty--and thereby the rule against conflicts of interest--is violated. Part and parcel to the imputed disqualification rule is whether an

appearance of impropriety exists. That is, whether it appears that a lawyer's duty of loyalty may be suspect. If there is an appearance of impropriety, that lawyer is violating his/her duty of loyalty and thereby violating the ethical rule against conflicts of interest. If one lawyer is disqualified because of this appearance, then the imputation is absolute. All lawyers within an office are likewise disqualified, in part because of the financial incentive.

To assist in answering this imputed disqualification question, the State Bar of Montana (the Bar) issued a formal, but not binding, ethics opinion targeting the general conflict of interest rule (Rule 1.7) and the general imputation of conflicts of interest (Rule 1.10) across public defenders. The facts presented were as follows:

> A county hired its first full time public defender to begin the "office of the chief public defender." This office quickly added two full-time attorney positions. Previously, these positions had been held by contract attorneys.
>
> In an effort to respond to challenges presented by conflicts of interest, the office transferred one full-time attorney to an office on the opposite side of the building. This new "office of conflict counsel for the public defender" includes a separate computer system not linked to the office of the chief public defender; a separate filing system for open and closed case files; separate letterhead and business cards and separate rooms in the county courthouse. There is no supervision by the chief public defender on client cases assigned as conflict cases, although general supervision is present over non- conflict cases. Budgetary authority for the conflict counsel office is maintained by the chief public defender for administrative purposes only. Administrative control and hiring authority over conflict counsel also resides with the chief public defender. A Public Defender Advisory

> Board exists to review substantive decisions as to administration and conflict issues made by the chief public defender.

Op. 960924.

On these facts, the Bar addressed whether the steps taken by the county were sufficient to satisfy the requirement of conflict-free counsel under Rule 1.7, and whether additional safeguards were advisable to ensure conflict-free counsel. Op. 960924.

The Bar noted that some jurisdictions treat public defender offices like a private law firm for conflict of interest purposes. In doing so, if one public defender is disqualified, such disqualification is imputed to the entire office. Op. 960924.

However, the Bar also noted that other jurisdictions do not apply the same per se conflict rule to public defender offices. And, the Bar agreed it was "inappropriate to apply the per se conflict rule to public defender offices." In so agreeing, the Bar relied on *State v. Pitt*, 884 P.2d 1150, 1156 (Hawaii Ct Appeals 1994) and *State v. Graves*, 619 A.2d 123 (Md App. 1993) for the following:

> [A] conflict on the part of one member of the public defender's office does not extend per se to others in the office unless, after a case-by-case inquiry, it is determined that facts peculiar to a case preclude representation of competing interests by members of the office.
>
> [U]nder the case-by-case approach, if attorneys employed by a public defender are required to 'practice their profession side by side, literally and figuratively, 'they are considered members of a "firm" for purposes of conflict of interest analysis regarding representation of

> multiple defendants, but where the practice of the attorneys in the office is so separated that the interchange of confidential information can be avoided or where it is possible to create such separation, the office is not equated with a firm an no inherent ethical bar would be present to the office's representation of antagonistic.

Op. 960924.

The Bar explained that a case-by-case analysis should be made in order to determine whether a public defender's office is equated to the same law firm for conflict purposes. In particular,

> Rules that forbid lawyers to accept matters because of a 'conflict,' and rules that impute a lawyer's conflict to his or her associates, have one paramount object - to prevent lawyers from entering into situations in which they will be seriously tempted to violate a client's right to loyalty and secrecy. Conflict rules try to strike an appropriate balance between protecting against risk to loyalty and confidentiality, on the one hand, and fostering the availability of counsel on the other. . . . The question, therefore, is not whether a lawyer in a particular circumstance 'may' or 'might' or 'could' be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement or representation ought to be forbidden categorically.

Castro v. Los Angeles County Board of Supervisors, 284 Cal. Rptr. 154, 162 (1991). Based on this analysis, the Bar determined the focus should be (1) whether, as a consequence of having access to confidential information, a public defender refrains from effectively representing a defendant; (2) whether the attorneys employed by the same public defender's office can be considered the same as private attorneys associated in the same firm; and (3) whether confidential

information is protected by an effective 'wall' separating offices, facilities and personnel." Op. 960924.

The Bar concluded the office of conflict counsel was "sufficiently separated from the office of the chief public defender so as not to be considered the same as private attorneys associated with the same firm." Op. 960924.

According to the Bar's Opinion 960924, if the offices are separate, does such an appearance of impropriety exist so as to equate to a per se conflict of interest that is imputed to the appellate office? Although the phrase "appearance of impropriety" is not contained within the Rules of Professional Conduct, the former code stated lawyers should avoid an appearance of impropriety. *See In re Rules*, ¶ 9. The Bar's Opinion suggests just the same by quoting *Castro*, namely "The question, therefore, is not whether a lawyer in a particular circumstance 'may' or 'might' or 'could' be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement or representation ought to be forbidden categorically." *Castro*, 284 Cal. Rptr. At 162 (1991). In light of the potential for an appearance of impropriety, it should be remembered that the ethical rules allow for continued representation upon consultation with the client and the client's waiver. *See* Rules 1.7, 1.9.

Applying the law to the issues presented here, although each regional office is overseen by the Chief Public Defender, each regional office operates autonomously. Each regional office has a regional manager who retains direct management authority over the lawyers and corresponding cases within each region. A lawyer in one region cannot access case information developed for a different client in another region. Each regional office has its own clerical staff, investigators, separate offices, and separate files. Based on the Bar's Opinion 960924, although the Regional Offices are supervised by the Chief Public Defender, each regional office is separate. When a case is transferred from one region to the next, a per se conflict does not exist. And, the same analysis applies to contract attorneys, who operate autonomously. The Contracts Manager oversees all contracts. While the Contracts Manager reports to the Chief Public Defender, the Chief Public Defender's role is administrative. Hence, again under the Bar's Opinion 960924, no conflict of interest exists.

Applying the law to the appellate situation is not as clear as the analysis for the regional offices and the contract attorneys. Again, different States have addressed the issue differently. For example, Colorado has held the following:

> We believe that requiring a member of the appellate division to argue that a local deputy public defender rendered ineffective assistance of counsel would have an inherently deleterious effect on relationships within the public defender system and would be destructive of an office upon which the criminal justice system relies to provide competent legal services to indigent defendants. Moreover,

> notwithstanding the vigor and skill with which the appellate division attorney might present the ineffective assistance of counsel argument, the conflict of loyalties inherent in the attorney's role would make the quality of his or her representation, and thus the fairness and impartiality of the appellate process, necessarily suspect in the public eye. This would derogate from the prescription of Canon 9 of the Code of Professional Responsibility that "[a] lawyer should avoid even the appearance of professional impropriety." For these reasons, we conclude that the rule of imputed disqualification must be applied in this case, with the result that the appellate division must be permitted to withdraw from representing the defendant. *See Hill v. State*, 263 Ark. 478, 566 S.W.2d 127 (1978) (appointing one public defender to represent on appeal a convicted person who is asserting that another public defender provided ineffective assistance of counsel at trial involves inevitable conflict of interest); *Adams v. State*, 380 So. 2d 421 (Fla. 1980) (same); *State v. Bell*, 90 N.J. 163, 447 A.2d 525, 528 n.2 (1982) (adopting *per se* disqualification rule in cases where a public defender is required to attack the trial competence of another public defender; case-by-case rule for other types of conflict of interest); *Commonwealth v. Fox*, 476 Pa. 475, 383 A.2d 199, 200 (1978) (disqualifying public defender's office in all cases requiring that public defender representing criminal defendant on appeal argue that ineffective assistance of counsel was provided by another public defender at trial); *cf. Angarano v. United States*, 329 A.2d 453, 457 (D.C. App. 1974) (rejecting suggestion that an appellate public defender could argue constitutional ineffectiveness of counsel provided by public defender who represented defendant at trial). 7

McCall v. Dist. Ct., 783 P.2d 1223, 1228 (Colo. 1998).

In addition, the American Bar Association Standards for Criminal Justice provide, in part:

> If the defender attorney on appeal believes that an issue of ineffective assistance of counsel should be presented, the defender program should be excused and private counsel appointed to the case. Unless this is done, the appellate lawyer from the defender office will be faced with a conflict of interest in complaining about the conduct of a colleague who represented the client in the trial court. The problem is

avoided in jurisdictions that have established wholly independent statewide appellate defender programs.[1]

Montana has not adopted the ABA standard for criminal justice. *Hendricks v. State*, 2006 MT 22, ¶ 14, 331 Mont. 47, 128 P.3d 1017.

Finally, the National Association of Criminal Defense Lawyers' "Standards and Evaluation Design for Appellate Defender Offices" do not require separate appellate and trial offices, but conclude that a conflict of interest appears whenever "the defendant was represented by the trial division of that same defender agency and it is asserted by the client or appears arguable to the appellate attorney that trial counsel provided ineffective representation."[2]

Nineteen states have a state-wide public defender system. Eighteen of those states also provide primary appellate services. Those states include: Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maryland, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, Wisconsin, and Wyoming.

For purposes of the closest comparison to Montana's situation, of the states that have an appellate defender program, the following states also do not have an intermediate appellate court: Delaware, Rhode Island, Vermont, and Wyoming.

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[1] ABA Standards for Criminal Justice, Providing Defense Services, (3rd ed. 1992). Standard 5-6.2, Commentary at page 84, available at http://www.abanet.org/crimjust/standards/providingdefense.pdf at page 97.

[2] NACDL Standards and Evaluation Design for Appellate Defender Offices, Standard E.1.b., available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_Appellate_Defender_Offices#twoe. See also NACDL Standard J.4.

Review of how these states handle the conflict issue is telling because they are faced with same budget and judicial constraints that Montana has.

Delaware: One statewide attorney is devoted to working on appeals. All other public defenders must file their own appeals and represent their clients on appeal. The report indicates that this setup is "efficient for courts and for the state," but it "has its critics . . . where the argument of ineffective representation of trial counsel may be raised in a direct appeal, there is at least the potential for a conflict of interest to arise should an attorney be faced with raising the issue of his own ineffectiveness."[3] The report does not suggest Delaware stop its practice; however, it recommends that the office "create written policies and procedures for handling its own appeals, including situations that involve potential conflicts of interest."[4] The report indicates that materials from the American Bar Association and the National Legal Aid and Defender Association be considered.[5] No ethics opinion regarding this could be located.

Rhode Island: The Appellate Division is under the Public Defender and the Deputy Public Defender. It consists of five attorneys who handle "all appeals to the Rhode Island Supreme Court of cases tried by public defender attorneys as well

[3] The Spangenberg Group Delaware Public Defender 2004 Review, Final Report, September 17, 2004 at 24-25.
[4] The Spangenberg Group Delaware Public Defender 2004 Review, Final Report, September 17, 2004 at 24-25.
[5] The Spangenberg Group Delaware Public Defender 2004 Review, Final Report, September 17, 2004 at 24-25.

as those cases referred by the private bar on behalf of indigent appellants."[6] No ethics opinion regarding this setup could be located.

Vermont: Two offices within the Vermont Office of the Defender General handle post-adjudication matters. "The Appellate Defender handles appeals to the Supreme Court. The Prisoners' Rights Office represents persons in the custody of the Commissioner of Corrections."[7] Vermont Ethics Opinion 76-18 states that "two or more Public Defenders may not represent clients with differing interest and *the Correctional Defender may not provide representation to challenge the representation given by a Public Defender*."[8]

Wyoming: The Appellate Division is under the State Public Defender. In this setup, the Public Defender represents individuals on appeal to the Wyoming Supreme Court. In doing so, it is recognized that "To determine the effectiveness of the representation provided by the State Public Defender, the appellate division attorneys may decide to raise an issue of ineffective assistance of counsel (IAC) as an issue on appeal."[9] No ethics opinion regarding this setup could be located because Wyoming does not issue such opinions.

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[6] Rhode Island Office of the Public Defender; Public Defender Organizational Chart, http://www.ripd.org/Organization/orgchart.htm; Appellate Division, http://www.ripd.org/Organization/Appellate.htm

[7] Office of the Defender General, http://defgen.vermont.gov/about_us

[8] Public Defender Conflict of Interest Ethics Opinions, http://69.39.146.6/Upload%20Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Conflict%20of%20Interest/conflict.htm

[9] http://www-wsl.state.wy.us/slpub/reports/Public%20Defender.pdf

The Appellate Defender Office (ADO) is a separate office for purposes of application of the State Bar Opinion 960924. The information ADO has about a case is not accessible by the regional attorneys. The ADO has separate support staff, separate files, and operates on a separate floor from the Helena regional office and the Major Crimes Unit. The ADO has a separate manager--the Chief Appellate Defender. Management of the office rests with the Chief Appellate Defender. She handles the hiring, firing, and transferring of the lawyers. The Chief Public Defender does not involve herself in the case decisions made for any appellate attorney's case. In addition, the Chief Appellate Defender has control over the budget with the Chief Public Defender providing general oversight.

Because the Chief Appellate Defender reports directly to the Chief Public Defender, however, the question becomes whether ADO is sufficiently autonomous in its decisions to raise ineffective assistance counsel claims against the regional attorneys. The answer to this question boils down to a State's approach to the duty of loyalty and the appearance of impropriety.

The States who have adopted a case-by-case analysis with regard to this issue note that public defenders do not have a financial stake in the outcome of their clients' cases nor in the reputations of their public defender colleagues. This approach presumes public defenders have a dedication to their clients that alleviates any concern about institutional loyalties that might inhibit their

advocacy. Finally, practical considerations, such as the specialization that criminal appellate lawyers posses justify those lawyers taking regional cases, as greater expense and less expertise may result in contracting out the case.

States in favor of a per se rule contend that public defenders have a financial interest in, as well as a strong loyalty to, each other's reputation and the institution itself. The Montana Supreme Court's decision in *State v. Thompson*, 1999 MT 108, ¶¶ 12-15, 294 Mont. 321, 981 P.2d 778 and the Bar Opinion 960924 are instructive on this point.

In *Thompson*, the Court addressed whether the appellant was entitled to the appointment of new counsel because his present counsel filed a motion to withdraw in which he asserted that he was unable to find any non-frivolous issues to raise on appeal. Appellate counsel asserted by claiming he could not find any non-frivolous issue and then being asked to brief a specific issue, his ability to do so effectively might reasonably be questioned again because he initially argued no non-frivolous issues existed. *Thompson*, ¶ 13. The Court reviewed the arguments appellate counsel raised and concluded that Thompson was represented effectively. Hence, it was not necessary for the Court to appoint new counsel. *Thompson*, ¶¶ 14-15.

From this case, the Court arguably will favor a case-by-case analysis, whereby no conflict exists so long as ADO brings IAC claims that are legally and tactically warranted and ADO does so in a competent manner.

The Bar quoted *Castro* stating "The question, therefore, is not whether a lawyer in a particular circumstance 'may' or 'might' or 'could' be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement or representation ought to be forbidden categorically." *Castro*, 284 Cal. Rptr. at 162 (1991). Is the likelihood of an appellate attorney doing something improper (like not raising an ineffective assistance of counsel claim)--in the eyes of a reasonable observer--of sufficient magnitude that the representation be forbidden?

The Montana Supreme Court would likely conclude the answer is "no." The ADO does not have a financial stake in its clients' cases. The ADO does not have a financial stake in or a strong loyalty to the reputation of its colleagues. The ADO's duty remains with its clients. Colorable ineffective assistance of counsel (IAC) claims are raised infrequently, as the likelihood of success on appeal is limited due to the burden of proof required. In particular, colorable IAC claims on direct appeal require that the lawyer's deficient performance be detailed on the record and that the lawyer's deficient performance also prejudice the client. The ADO is comprised of criminal appellate experts dedicated to defense of the

indigent. Stated another way, all lawyers who work for OPD--trial and appellate lawyers alike--already know that they are helping people whom others are unlikely or unwilling to help.

Contracting out any case where the regional lawyer thought he/she was ineffective would not alter the potential for an appearance of impropriety in the eye of a reasonable observer. That is, the contract attorneys have a greater quantifiable financial and loyalty stake in shying away from IAC claims against regional attorneys because ADO contract work provides a significant part of some contract attorneys' livelihood. It is true, that we, as ADO lawyers, have some level of loyalty to our colleagues and the OPD agency. The issue is whether a reasonable observer would conclude that institutional loyalty would override our core values of duty to the client, first and foremost.

If the ADO reports to the Commission, it will not change the potential conflict under the per se analysis. It could still be argued that our connection to the Commission would create such an appearance of impropriety as to equate to a per se conflict. If Montana adopts the per se stance, the ADO should be an entirely separate agency--not under the Commission, not under another person, but under the Department of Administration or some other agency without connection to the Commission. That type of separation, of course, requires a legislative change and a substantial financial change as well. Even if the ADO operates an entirely

separate agency, it would still be part of the public defense team. Individual appellate lawyers would still feel some degree of loyalty to colleagues in this small Montana Bar, regardless of whether they were public defenders, contract attorneys, or members of a private firm. Such loyalty does not override our loyalty to our clients, which is the primary duty of every lawyer.

In conclusion, the ADO should seek the State's opinion on this issue, as well as the State Bar of Montana's. (The Commission's attention to the Order in *State v. Schmidt*, DA 08-0137 is invited. In that Order, Chief Justice McGrath, formerly the Montana Attorney General, declined to recuse himself from criminal appeals, as opposed to his general authority over prosecutions throughout Montana and his titular authority over the Appellate Bureau of his office.) Following discussion, I propose a brief be submitted with a motion that Koan Mercer will file on behalf of his client. Mr. Mercer's client is alleging that ADO must withdraw because a conflict exists since ADO is part of OPD. The issue regarding conflicts at the regional level will be addressed in *State v. St. Dennis*, DA 09-0284, an appeal that an appellate contract attorney is handling. The ACLU has been granted authority to appear as amicus in *St. Dennis*, wherein the ACLU "anticipates that this appeal will involve issues concerning the constitutionality of the statewide public defender system, a question of great interest and concern to ACLU-MT." (Order, DA 09-0284.)

We cannot know for sure how this issue will be decided. We have instructive opinions from sister states who have split on the approach to the conflict issues. Montana is a large state with a small legal bar and an even smaller criminal bar. States with our similar budgetary and judicial constraints handle conflict issues in much the same manner as we currently handle them. However, resolution from the Montana Supreme Court is ultimately required for this issue.

I look forward to our discussion.